No. 21,902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FEB 2 1 1969

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MACMILLAN RING-FREE OIL CO., INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF OF RESPONDENT MacMILLAN RING-FREE OIL CO., INC.

FILED

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STATEMENT OF THE CASE.

This case arises out of a Petition for Enforcement of an Order issued by Petitioner, National Labor Relations Board (hereinafter "Board"). The Board below adopted the findings, conclusions and recommendations of the Trial Examiner who had found that the Company violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136,73 Stat. 519 29 U.S.C. §161, *et seq.,* hereinafter "Act"), for having failed to negotiate in good faith with the representative of its production and maintenance employees, and Sections 8(a)(3) and (1) of the Act by withholding vacation pay from four striking employees.

JURISDICTION.

The Respondent concedes the jurisdiction of this Court as set forth in Petitioner's Brief (Pet. 1-2).[1]

STATEMENT OF FACTS.

The following is a partial statement of the relevant facts. Because of the nature of the questions presented to this Court, it is not necessary to belabor the extended and lengthy facts which were introduced during the hearing below, or to contest the many findings of the Board which are irrelevant to a resolution of these issues. Some setting forth of the facts relating to specific arguments are included in the argument portion of the brief as seemed appropriate for clarity and understanding.

A. Background of Negotiations.

The Oil, Chemical and Atomic Workers International Union, AFL-CIO, and Long Beach Local No. 1-128 (hereinafter referred to as "Union" or "OCAW"), organized the employees of the Company and was certified to represent them in 1960 [R. 21; Tr. 51, G.C. Exh. 2]. The Union, in 1960, successfully negotiated what objectively must be termed a very favorable Collective Bargaining Agreement from the Union viewpoint [R. 21; Tr. 51,585, G.C. Exh. 3(c)]. That agreement contained some unique clauses, such as a wage reopening clause which permitted either part to reopen wages by serving upon the other party, sixty (60) days'

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[1]References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings," are designated as "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated as "Tr." References designated "R. Exh." and "G. C. Exh." are to the exhibits of Respondent and the General Counsel, respectively. References designated "Pet." are to portions of Petitioner's Brief.

written notice at any time during the life of the agreement (Art. II). The Union quickly availed itself of the wage reopening clause, serving notice within sixty (60) days of the inception of the agreement [R. 21; Tr. 52,580].

Within the first year of Union representation, there were a series of strikes, the last one in 1961, lasting for over seven (7) weeks [R. 20-24; Tr. 603-605, 608-609, 880]. The parties signed a Strike Settlement Agreement following the seven week strike [G.C. Exh. 3(e)]. Although in the Strike Settlement Agreement the parties agreed to negotiate a new agreement [R. 24; G.C. Exh. 3(e)], the Union failed and refused to engage in meaningful negotiations for a new agreement different in any realistic sense from the old 1960 collective Bargaining Agreement [R. 24-25; Tr. 63-64, 66, 312; R. 27; G.C. Exh. 3(g); Tr. 200, 213-214; R. 39; G.C. Exh. 3(aa); Tr. 809, 991].

The Company presented a proposal in writing incorporating many of the provisions of the 1960 agreement which were consistent with what the Company considered to be needed for reasonable management operating efficiency and authority, and in addition, proposed new provisions to correct some of what it believed to be obvious inequities in the 1960 agreement [R. 25; G.C. Exh. 3(f)].

The Company, during the course of bargaining from 1960 through 1965, made various proposals to the Union, including two full written proposals [R. 25; G.C. Exh. 3(f); Tr. 63; R. 27; G..C Exh. 3(h); Tr. 111]. The Union during this period also submitted two "new" written proposals [R. 27; G.C. Exh. 3(g); Tr. 200, 213-214; R. 39; G.C. Exh. 3(aa); Tr. 809, 991]. However, as the analysis of these Union proposals set forth below dramatically illustrates, the Union

completely failed and refused to make constructive counter-proposals to the Employer's proposed modifications, but instead persisted in demanding reinstatement of the 1960 agreement changed only to include economic improvements.

The Company had substantial reason to believe that the Union and its members in the conduct of their three precipitous strikes had acted irresponsibly and, after the settlement of the last strike in June of 1961, that the Union had authorized and engaged in acts of harassment against nonstriking employees and the Company [Tr. 881-884, 893].

Numerous meetings were held with merely a regurgitation of the respective positions of the parties. Some matters were resolved during this period of negotiations such as an agreement granting increased vacations [R. 30, G.C. Exh. 3(m); Tr. 127] and another agreement providing a five percent wage increase [R. 29; G.C. Exh. 3(k); Tr. 118, 783, 898], but the parties remained apart on what both considered to be the most important and crucial provisions of the new agreement; union security, check off, the grievance and arbitration procedure and basic management rights. During this period of time, the Union did not give even an iota of recognition to any of the management's requests or proposals in order to achieve accommodation and reconciliation of their interests vis-a-vis those of management.

Finally, on September 2, 1964, a further "final" and complete proposal in a written form was presented by the Company together with a substantial wage increase [R. 33-34, G.C. Exh. 3 (q), Tr. 136, 790]. This was rejected out of hand by the Union without a moment's consideration with an insistence on the 1960 agreement with its economic amendments, or as its minimum de-

mand, an immediate institution of the union shop, the recognition clause, a 4½% wage increase and further negotiations [Tr. 310]. With precipitous haste and within six days after submission of the Company's proposals and without regard to the substantial wage increase or, in the alternative, a pension plan (which wage increase offer the Union denied had been made on September 2, 1964, but, as found by the Trial Examiner, had been made by the Company prior to the strike [R. 17]), the Union called its members out without even taking a strike vote on the Company's last proposal [Tr. 346].

During the strike, there followed the same pattern of irresponsibility as in the previous strikes and post-strike periods. There were numerous incidents of violence, mass picketing, damage to Company property and threats of violence against nonstrikers and new employees [R. 40-43]. Some of these acts were more serious than practically any experienced in recent years, such as a molotov cocktail being thrown into a non-striking employee's child's bedroom [Tr. 700, 713-714]. The Petitioner argues that because there was no positive proof that officials of the union caused the violence, all the evidence of violence was irrelevant to a consideration of any position taken, or failed to be taken, by the Employer (Pet. 35-36). We believe that the evidence establishes such connection without contradiction [Tr. 700, 713-714, 717, 721, 743, 760-763]. Furthermore, anyone versed in the dynamics of labor relations and employee and management relations must recognize that the activities such as engaged in in the instant case must as a necessity create such an all pervasive and dominating atmosphere so as to influence the parties, both consciously and subconsciously, in their adoption of bargaining postures. The Employer had

every reason to believe that the Union was responsible, either actively or passively, for this conduct.[2]

During the strike the parties continued to meet and to discuss the proposals on which they were in disagreement.

A charge was filed by the Union on November 10, 1964 and a copy of the charge was served on the Company on the same date by registered mail. A complaint was issued on August 11, 1965.

B. Conduct of the Hearing.

i. Introduction of Evidence Preceding 10(b) Period of Limitations.

At the inception of the hearing before the Trial Examiner, counsel for Company repeatedly objected to the wholesale introduction of evidence preceding the 10-(b) period of limitations of the Act, and although he granted a "continuing objection," the Trial Examiner allowed the introduction of a myriad of events and acts antedating the 10(b) period by as much as three and one-half years [Tr. 35, 48, 51-52].

ii. Quashing of Subpoenas Served Upon Federal Mediators.

Commissioners Grant Haglund and Jules Medoff were present at six of the negotiating meetings from November 12, 1963 to January 12, 1965 which were attended by the parties principal negotiators [G.C. Exh. 3(b)]. The Company properly served subpoenas on the two mediators [Tr. 637-638]. A petition was filed by the Federal Mediation and Conciliation Service to

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[2]The return of one striker to work who was named in certain court papers as having engaged in isolated incidents is but a further recognition of the concern by the Company that the Union, rather than the individual employee, was responsible [R. 42, Tr. 755-757].

revoke the subpoenas, and the Trial Examiner granted the petition [R. Exh. 6(c), Tr. 669, 636-675].

During the argument before the Trial Examiner, counsel for Company clearly set forth why the Company should be allowed to avail itself of the testimony and records of the two mediators if it were to be given a fair hearing. As an offer of proof, counsel for Company set forth that one of the mediators, Mr. Haglund, had met with respresentatives of the N.L.R.B. on more than one occasion, revealing information as to what transpired during the meetings between the parties [Tr. 654]. The Company also contended that serious and critical issues of credibility could be resolved only by compelling the testimony of the mediators [Tr. 651].

Subsequently in the hearing, Mr. Becker was not permitted by the Trial Examiner to testify concerning his knowledge that the Federal Mediation and Conciliation Service was cooperating with the N.L.R.B. in the preparation of its case. Counsel for Company then made an extended offer of proof to the effect that one of the N.L.R.B. agents, by the name of Belle Karlinsky, had admitted to Mr. Becker that she had discussed the case with Mr. Haglund, and that Mr. Haglund had admitted to Mr. Becker that he had given some information to Mrs. Karlinsky, at least he had given to her the dates of the meetings between the parties [Tr. 949-952].

Later in the hearing, because of the importance of the issue, counsel for Company renewed the above offer of proof and moved that the Trial Examiner reconsidered his ruling on the Petition to Revoke. The Trial Examiner denied the motion [Tr. 962].

QUESTIONS PRESENTED.

The questions presented are as follows:[3]

(1) Did the Company violate Section 8(a)(5) of the Act by not acceding to the Union's demand for a return to the 1960 Collective Bargaining Agreement during the period of negotiations?

(2) Is that portion of the Board's Decision and Order finding that the Company violated Section 8-(a)(5) of the Act unenforceable because it is based entirely on events which preceded the 10(b) limitation period of the Act?

(3) Was the Company denied due process by the Trial Examiner's refusal to compel officials of the Federal Mediation and Conciliation Service to testify?

(4) Did the violence, threats and intimidation of the pickets, directed toward the Company and its employees suspend the Employer's duty to bargain from September 8, 1964 until the date of the hearing, or did such violence create an atmosphere which precluded measuring the good faith of Company?

(5) Could the Company be found to have violated Section 8(a)(5) if the Union itself was bargaining in bad faith and/or in such a manner that the Company's good faith could not be measured?

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[3]Although the Company believed that it was justified in cancelling all vacations for all employees, whether or not they were working or striking, no detailed argument will be made at this time as to the correctness of that portion of the Board's order relating to a violation of Sections 8(a)(1) and (3) because of its refusal to grant vacation pay to certain strikers. Inasmuch as this violation was found to be completely unrelated to the refusal to bargain aspects of the case, it should have no relevance to a determination of the questions herein [R. 61, 64].

ARGUMENT.

I.

At No Time Did the Company Engage in Dilatory or Bad Faith Bargaining in Violation of Section 8(a)(5) of the Act.

Because of the lengthy hearing, voluminous transcript and discursive Intermediate Report which was adopted in its entirety by the Board, it is necessary to capsulize the findings by the Trial Examiner so that they may be put in proper perspective.

First, as will be discussed below, the Trial Examiner based his determination that the Company violated Section 8(a)(5) of the Act completely upon evidence which antedated the period prescribed by Section 10(b) of the Act, and therefore, his findings are not supported by substantial evidence in the record.

Secondly, although the facts in the case warrant the conclusion that the Company engaged in admittedly hard bargaining, its action and conduct were in complete accord with the dictates of the Act. However, the Trial Examiner must have reached the conclusion that if an employer and a union bargained for over four years without reaching a definitive collective agreement, the employer must have been at fault. The Examiner combed the transcript for minor contradictions or inaccuracies in the testimony (many, if not all, predating the 10(b) period) which were magnified out of all proportion so that they might appear to lend support to his determination of bad faith bargaining. (Petitioner concedes that none of the proposals of Company were a *per se* violation of the Act and that the

Company had the right to request the Union to settle for something less than the 1960 contract [Pet. 34, Tr. 21]).

As is demonstrated by the Trial Examiner's summary, he based his entire determination that the Company had bargained in bad faith upon (1) the Company's "open shop" and other "inhibiting" proposals, (2) the Company's alleged "foot dragging" in arranging a meeting following the session of December 13, 1963, (3) the Company's method of placing in effect a vacation proposal outside the 10(b) period; (4) the fact that no meeting was held between December 13, 1963 and May 7, 1964 and (5) the Company's failure to present a final proposal in a written form until September 2, 1964 [R. 58, lines 24-40].

As for the Company's "open shop" proposal, although the Trial Examiner avoided stating that such was his determination, it is obvious from a reading of his entire opinion that he concluded that any such proposal having once had a union shop in fact constituted *per se* a refusal to bargain. The same is true of other proposals made by the Company, relied upon by the Trial Examiner as inhibiting and which were first made long before the filing of the unfair labor practice charge.

In a similar error, the Trial Examiner took special efforts in his Intermediate Report to continually disregard the testimony of the Company's witnesses and to discredit the asserted positions of the Company by noting the Company's alleged "foot dragging" in arranging a meeting following the session of December 13, 1963. Company's witnesses testified that a final proposal was presented to the Union then and there, on December 13, 1963 [Tr. 781, 903-904]. It was clear from that testimony that Mr. Becker's promise to place the Company's final proposal to writing and his state-

ment that it would take some time did not have the meaning put upon it by the Trial Examiner. The Trial Examiner would have the Court believe that Mr. Becker used the length of time necessary to place the Company's proposal to writing as a dilatory tactic and that the Union was not informed of the Company's final proposal until September 2, 1964. Clearly within the context of the meeting of December 13, 1963, Mr. Becker meant that it would take too long to reduce the Company's final proposal, which had been given to the Union negotiators orally, to writing during the course of *that* meeting. Such being the case, and with no expression of interest on behalf of the Union negotiators in signing such a proposal, it is not difficult to understand why Mr. Becker did not view the reduction of the Company's final proposal to writing as being a matter which should be done immediately or which could have any influence on preventing or delaying the parties from reaching an agreement. The Parties full well knew their respective positions, and the Company was certainly aware of the Union's intransigence. The reduction to writing was a clerical act which did not advance the understanding of the parties at all. Yet, time after time, the Trial Examiner makes reference to this ambiguous statement of Mr. Becker and uses it, a statement having no evidentiary value or weight at all, to bolster his determination as to the Company's state of mind at all times relevant to the allegations of the Complaint. The Petitioner used the Trial Examiner's findings that the Company did not present a final proposal until September 2, 1964 in an identical manner for identical purposes (See Pet. 32-33).

From the weight of the evidence, as discussed above, the Company submitted its "final proposal" orally at the meeting of December 13, 1963.

The Petitioner's attempt to characterize Company's bargaining as revealing "foot dragging" is not substantiated by the evidence and such language is a mere label. It is undisputed that the Employer always met with the Union upon request. Although at first blush the Union's principal negotiator's evasive answers to questioning in regard to this matter are quite confusing to say the least, nevertheless, once his contradictory verbalizations are untwined, it is clear that the Company's negotiators only cancelled one meeting, and the Union negotiators did not offer any protest at that one cancellation.

> "Trial Examiner: Let me ask you. On any occasion when there was, during the course of your negotiations, postponement of a set meeting by Mr. Becker on any occasion, did you or anybody else representing the union to your knowledge offer a protest to it?
>
> The Witness: That is the only time I recall when we didn't offer a protest.
>
> Q. (By Mr. Carr) You offered no protest when this meeting was changed from August 20th?
>
> Trial Examiner: He just said so.
>
> Mr. Carr: I know. I am just trying to put the thing in proper context.
>
> Trial Examiner: He may give you another answer, but go ahead, if you want.
>
> Q. (By Mr. Carr) However, you did protest every other time he cancelled a meeting?
>
> A. I just told you I don't recall any other time of him cancelling." [Tr. 332, line 19, to 333, line 12].

Additionally, it must be noted that Petitioner largely bases its entire position upon the label of "foot dragging" which was a conclusion that the Company failed to meet during a period *which occurred prior to the*

limitation period set forth in Section 10(b) of the Act. Obviously, the Union was not concerned with the absence of meetings during the 10(b) period, since on May 7, 1964, as found by the Trial Examiner, the Union itself agreed to defer negotiations for over a four-month period [R. 31; Tr. 785-786, 908].

Certainly after the meeting of September 2, 1964 there may be no contention that the Company was dilatory or guilty of "foot dragging." From September 2, 1964 until December 4, 1964, the parties met on six occasions: September 2, 1964; September 4, 1964; October 8, 1964; November 6, 1964; November 24, 1964; and December 4, 1964 [R. 34, 37, 38; G.C. Exh. 3(b); Tr. 789, 792, 796, 797, 798, 799]. Since Mr. Becker was to be in New York on another matter, the parties agreed not to meet until after the holidays [Tr. 939]. Taking into consideration the fact that the Union had elected on September 8, 1964 to engage in an economic struggle with the Company, and that, because of the violence, mass picketing and intimidation which followed, the Company was in a state of "siege," it is not surprising that the parties did not meet at more frequent intervals during that period of time. Furthermore, as considered in Section IV, *infra,* the Union's consistent "take it or leave it" attitude manifested by its adamant refusal to suggest or consider significant modifications of the 1960 agreement was not such that any employer would be obligated to pursue additional meetings. The Union's attitude made it absolutely clear that the Company would arrange as many meetings as it desired and that its position would not vary.

Thus, when the Intermediate Report of the Trial Examiner is dissected, it may only be concluded that the Company was found guilty of a refusal to bargain because the two parties failed to reach an agreement and because the Trial Examiner found various proposals of

the Company to be repugnant to his personal view of what constitutes a reasonable provision for a collective bargaining agreement.

Under the decisional law of the Supreme Court and the N.L.R.B. it is clear that the Board cannot pass upon the substantive content of any of the Employer's proposals. The mere making of a proposal or maintaining of a position which is unacceptable to a union is not violative of the Act if the proposal is sincerely and genuinely adhered to by the proposing party.

Section 8(d) of the Act expressly provides by its terms that the obligation to bargain collectively compels neither party to agree to a proposal or requires the making of a concession. In the leading Supreme Court case interpreting the duty to bargain, *N.L.R.B. v. National American Insurance Co.* (1951), 343 U.S. 396, it was held that

> "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. *And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Emphasis added).
>
> *N.L.R.B. v. National American Insurance Co.*, 343 U.S. 396, 404.

In addition, the Court, laying down guidelines for the direction of the Board in future cases admonished:

> *"Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements."* (Emphasis added).
>
> *N.L.R.B. v. National American Insurance Co.*, 343 U.S. 396, 408-409.

Numerous Circuit Court and N.L.R.B. decisions have amplified this rationale and interpreted Section 8(d) as forbidding the Board from passing upon the substantive provisions of the parties' proposals.

In *Dierks Forests, Inc., etc.* (1964), 148 N.L.R.B. 923, the Board recently reiterated the philosophy expressed in the *National American Insurance* case.

> "Admittedly, the Respondent here engaged in a course of 'hard bargaining' and, as noted by the Trial Examiner, the Union was disappointed when it made concessions but failed to receive a *quid pro quo* from the Respondent. But the Board has been admonished by the Supreme Court that it may not, 'either directly or indirectly, compel concessions or otherwise sit in judgment upon the terms of collective-bargaining agreements.' "
>
> *Dierks Forests, Inc.,* 148 N.L.R.B. 923, 930.

Dierks is in fact a more difficult case from the employer's position in that there the Union had made concessions while here it did not.

See also:

N.L.R.B. v. Cascade Employers Association (9th Cir. 1961), 296 F. 2d 42.

In *McCulloch Corporation* (1961), 132 N.L.R.B. 201, the Board adopted the findings, conclusions and recommendations of the Trial Examiner. This case is important because the issues before the Trial Examiner were on all fours with the basic question of union security presented in the instant case. The company had taken the position from the beginning of negotiations that it would agree to neither a union shop nor check-off provision. Also, as in the instant case, there was in existence another collective bargaining agreement to which the company was a party which contained a union

shop provision [See G.C. Exh. 3(bb)]. Nevertheless, the Trial Examiner, recognizing that some unions are able to more effectively wield their strength in the collective bargaining forum and thereby obtain concessions while other unions are not, held that the mere refusal of the employer to agree to a union security clause was not violative of Section 8(a)(5) of the Act. (This is even apart from continuing and serious evidence of union irresponsibility such as here by which the union may be considered to have forfeited a reasonable claim to a union shop.)

Similarly, just as the Board may not pass upon the substantive proposals which are exchanged between the parties at a negotiating session, the mere fact that one party adheres to certain positions without deviation on certain proposals may not sustain a finding that that party refused to bargain in good faith.

N.L.R.B. v. Almeida Bus Lines, Inc. (1st Cir. 1964), 333 F. 2d 729;

Fetzer Television, Inc. v. N.L.R.B. (6th Cir. 1963), 295 F. 2d 244;

The Philip Carey Mfg. Co. (1963), 140 N.L.R.B. 1103;

Bethlehem Steel Co. (1961), 133 N.L.R.B. 1347;

Intercontinental Engineering & Manufacturing Co. (1965), 151 N.L.R.B. 139.

The Petitioner, in its brief, makes much of the fact that the Company attempted to reobtain for itself various management prerogatives. Certainly the law is not that once an employer executes a contract with a union, it may never again reobtain through negotiations for a new contract management prerogatives which he previously bargained away. First, as discussed above, the Board may not pass upon the substantive content

of the Employer's proposals. Secondly, the law is clear that one party may make any proposal as long as it is not illegal, and if genuinely adhered to, may maintain its adherence to that proposal throughout the course of negotiations. As the Court stated in *N.L.R.B. v. Cascade Employers Association* (9th Cir. 1961), 296 F. 2d 42, the Board is restricted in applying a totality of circumstances test and may not find that certain proposals of the Employer are, *per se,* violative of Section 8(a)-(5) if they do not violate some other section of the Act. The point is so obviously without dispute that it is not necessary to belabor it. For example, in *N.L.R.B. v. Almeida Bus Lines* (1st Cir. 1964), 333 F. 2d 729, the court reversed a finding by the Board that the employer had violated Sections 8(a)(5) and (1) of the Act. Once again, the facts presented in that case were identical with the conduct of the parties in the instant case. The union, since the first discussion of its proposals, had taken a position from which it would not waiver. It maintained that any collective agreement must include provisions for union security, dues check-off, arbitration and job selection on the basis of seniority. "Respondent was equally adamant that it would accept none of the four 'must' proposals." Also,

> "In addition to rejecting the Union's four 'must' proposals, respondent refused to grant any paid holidays, provide uniforms or provide a health and life insurance program. Contending the Almeida Bus Lines, Inc. was not in the charter business, it refused to discuss any contract provision concerning charter work. Counter offers made by Waldron with respect to overtime, seniority in layoffs and rehiring, length of work day, vacations, duration of the contract, and grievance procedure were not accepted by the Union and remained subject to further negotiation.
>
> * * * *

"The parties met again on March 1 for about six hours and the existence of a deadlock became apparent. Neither side retreated from its previous position save that on wages.

* * * *

"The meetings held on April 13, 18 and 25 accomplished very little and displayed continued intransigence on the question of the four 'must' provisions. * * *"

N.L.R.B. v. Almeida Bus Lines, 333 F. 2d 729, 732-733.

As in the instant case, the employer had stated to the union that he would "bend" on wages if the union would do some bending on their clauses. The Court held on those facts that the employer was not guilty of a refusal to bargain.

"Here, the Union was determined to negotiate with respondent essentially the same contract it had negotiated with other bus lines. It would not retreat from certain principles and its frustration increasingly mounted when respondent showed no intention to agree to those principles, although it was willing to agree to others."

* * * *

"The statutory duty to bargain collectively as set forth in Section 8(d) of the Act imposes upon the parties the obligation 'to meet * * *and confer in good faith with respect to wages, hours and other terms and conditions of employment' with a view to the final negotiation and execution of an agreement. The statute states specifically that this obligation 'does not compel either party to agree to a proposal or require the making of a concession.' Thus the adamant insistence on a bargaining position is not necessarily a refusal to bargain in good

faith. *National Labor Relations Board v. American Nat. Ins. Co.,* 343 U.S. 395, 72 S. Ct. 824, 96 L.Ed. 1027 (1952). 'If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system * * * of free collective bargaining.' *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231 (5th Cir. 1960). The determination as to whether negotiations which have ended in stalemate were held in the spirit demanded by the statute is a question of fact which can only be answered by a consideration of all the 'subtle and elusive factors' that, viewed as a whole, create a true picture of whether or not a negotiator has entered into discussion with a fair mind and a sincere purpose to find a basis of agreement. *NLRB v. Herman Sausage Co., supra; NLRB v. Reed & Prince Mfg. Co.,* 205 F. 2d 131 (1st Cir. 1953). Individual acts or statements of a negotiating party which appear contrary to the required attitude cannot be drawn upon to dilute a finding of good faith where the totality of the party's conduct conforms to the dictates of the statute."

N.L.R.B. v. Almeida Bus Lines, 333 F. 2d 729, 735-736, 731.

Thus, no finding of a refusal to bargain may be based upon either an employer's maintaining a set position on certain items, such as union shop and check-off, or on attempts to retain certain management rights to itself which are frequently sought and sometimes obtained by unions.

II.

The Finding That the Company Failed to Bargain in Good Faith Is Totally Unsupported by the Evidence, and Based Entirely Upon Events and Negotiations Occurring More Than Six Months Before the Filing of a Charge.

The Trial Examiner's discursive opinion, which was adopted by the Board in its entirety, constitutes forty-eight pages, with sixty-two lines to the page. The Trial Examiner expressly states that the role of events which antedated the six-month limitation period prescribed by Section 10(b) of the Act is merely to shed light on the true character of matters during the limitation period. However, an analysis of the Trial Examiner's findings demonstrates beyond any dispute that his determination that the Company bargained in bad faith was based entirely upon events antedating the limitation period. As such, the Trial Examiner's conclusions are not supported by the *reliable probative and substantial evidence* (Administrative Procedure Act, Section 7(c) 60 Stat. 241, 5 U.S.C. §1006) nor are they based on *substantial evidence on the record as a whole* (Sections 10(e) and (f) of the Act) nor was the case decided on a preponderance of the testimony (Section 10(c) of the Act). By established authority, the burden of proof rests with General Counsel to establish the allegations of the Complaint by substantial evidence. This burden does not shift and the Company is not required to prove the lawfulness of conduct on which there is no evidence to show that it is unlawful. Furthermore, as will be demonstrated, the Board based its determination that Company had bargained in bad faith solely upon events which as a matter of law may not support a finding that Company violated the Act.

Section 10(b) of the Act provides:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . .*". (Emphasis added).
>
> 29 U.S.C. §160(b).

At the very inception of the hearing, as noted above, counsel for the Company objected strenuously to the wholesale introduction of all evidence prior to the 10(b) period of limitations [Tr. 35, 48]. The objection was overruled by the Trial Examiner [Tr. 35, 51-52] and there was thereafter permitted throughout the hearing the introduction of evidence of acts occurring as early as 1960.

The complaint in this proceeding is dated August 11, 1965, and is based upon a charge which was filed on November 10, 1964. Therefore, Section 10(b) prohibits the finding of any unfair labor practice based upon events which occurred prior to *May 10, 1964.*

Although the Trial Examiner discusses to some extent the conduct and proposals of Company occurring subsequent to September 8, 1964, the Trial Examiner's own findings illustrate that he determined that the Com-

pany had refused to bargain solely upon events prior to September 8, 1964 because he found that the strike that began on September 8, 1964 *was caused* and prolonged by the Company's violation of its bargaining duty [R. 58, lines 42-46; R. 64, lines 34-36]. *That being the case, the record must support a refusal to bargain charge as of September 8, 1964.* However, an examination of the few events, proposals, conversations, etc. in evidence which occurred during the period May 10, 1964 to September 8, 1964, which were considered by the Trial Examiner, demonstrates they are totally insufficient to sustain a finding that the Company had violated its bargaining duty.

First, the Trial Examiner found that the parties had agreed at the meeting of May 7, 1964 to postpone negotiations during the pendency of industry-wide negotiations in order to allow the industry to reach a settlement that could be used by the parties to measure their bargaining proposals with regard to the economic provisions of any new collective agreement [R. 31, lines 25-39]. Since this agreement occurred before the six-month limitation period, then admittedly as of May 10, 1964, the parties having agreed not to negotiate, the Company could not have been in violation of its bargaining duty. The first event occurring during the six-month limitation period was a telephone conversation between Mr. Cody and Mr. Becker during the first part of August [R. 32; Tr. 132]. There is absolutely no evidence of any acts, proposals, negotiations, conversations, discussions, refusals to meet, or any other evidence during the six-month limitation period prior to this telephone conversation.

The Trial Examiner states that "the only matter of any substance in issue [referring to the details of the first August telephone conversation] is whether Mr.

Cody or Mr. Becker initiated the first call in August . . ." [R. 32, lines 18-20]. Both Mr. Cody and Mr. Becker claimed to have initiated the first telephone conversation which occurred in the first part of August [R. 31, lines 44-45; R. 32, lines 6-7]. However, despite the fact that the Trial Examiner found that Mr. Cody initiated the first telephone conversation [R. 31, lines 41-44], there is certainly no substance in such a finding upon which to base a determination that the Respondent refused to bargain [R. 31; Tr. 131, 785-786, 908]. It is beyond dispute that during the first telephone conversation which occurred between Mr. Cody and Mr. Becker in the first part of August, 1964, Mr. Cody did tell Mr. Becker that the industry had not yet reached a settlement [R. 32; Tr. 331]. Therefore, according to their prior agreement, there was no immediate compulsion upon either party to begin bargaining, and a determination whether or not Mr. Cody did in fact initiate the first telephone conversation in August constitutes not a scintilla of evidence to support a determination that Company had violated its bargaining duty. Thereafter, Mr. Becker, according to Mr. Cody's own testimony, did call Mr. Cody to arrange the negotiating session of September 2, 1964 [R. 31; Tr. 910-911, 838-840]. Certainly the Trial Examiner did not base his finding that the Company had violated the Act upon Mr. Becker's initiation of a bargaining session by his telephoning Mr. Cody sometime around the middle of August.

Thus from May 10 until the first part of September, 1964, there was absolutely no action taken by either of the parties upon which the Trial Examiner would be correct in attempting to utilize evidence of acts occurring prior to May 10, 1964, to shed light upon their true character.

The parties did meet on September 2, 1964 and the Trial Examiner did find that on that date Mr. Becker did make an offer to the Union of either a pension plan or a wage increase and did present to the Union a written contract proposal [R. 33; Tr. 135]. It is true, as noted by the Trial Examiner, that the Union did reject the Company's offer of September 2, 1964 [R. 33; Tr. 516, 790]. However, there is absolutely not a scintilla of evidence in the record concerning the meeting of September 2, 1964 which establishes that the Company was either attempting to undercut the Union or was bargaining in bad faith. The parties met again on September 4, 1964 under the auspices of the Federal Mediation and Conciliation Service. However, inasmuch as the Trial Examiner found that the parties were principally concerned at that meeting with a determination of whether or not the Company had in fact made a wage offer of 4½% on September 2, 1964 and because the Trial Examiner found that the Company had made such a wage offer [R. 34-36], nothing that occurred at that meeting demonstrates that the Company was refusing to bargain. The Trial Examiner himself summarized the positions of the parties as of September 4, 1964:

> "As of that point, the divisions between the parties consisted, basically, of the differences between the types of pension plans they had respectively proposed, and between the Union's contract proposal of September 19, 1962, the terms of which, putting aside its wage schedule and a relatively few minor changes, were virtually identical with those of the 1960 contract, and the Company's contract proposal of September 2, 1964, which, as previously indicated, was little different from the Company's proposal of October 18, 1962." [R. 36, lines 39-46].

The negotiating session of September 4, 1964, was the last meeting held by the parties prior to the strike, and except for the letter of September 3, 1964 which the Company mailed to its employees, was the last event occurring within the limitation period considered by the Trial Examiner.

The Trial Examiner expressly held that the record would not sustain a conclusion that the relevant statements in the Company's letter of September 3, 1964, "amount either to manifestations of bad faith in bargaining or any abridgement of the rights guaranteed employees by Section 7 of the Act." [R. 36, lines 29-30]. Therefore, the letter of September 3, 1964 was certainly not a basis for a determination that the Company had refused to bargain prior to September 8, 1964.

In order to realize the exceptional facts of the instant case and the clearly erroneous determination of the Trial Examiner and the Board, all of the events occurring during the six-month limitation period prior to the strike of September 8, 1964, as of which time the Trial Examiner concluded the Company was derelict in its bargaining duty, are set forth below in schedule form.

May 7, 1964 Agreement of parties not to meet until Industry Settlement final.

May 10, 1964 (*Inception of six-month limitation period*)

August (?) 1964 Becker-Cody telephone conversation *re* industry settlement.

August (?) 1964 Becker calls Cody to arrange meeting of September 2, 1964.

Sept. 2, 1964 Parties meet, Company offers 4½% wage increase or pension plan and submits written proposal.

Sept. 3, 1964 Company mails letter to employees (*expressly found to be no evidence of bad faith*).

Sept. 4, 1964 Negotiating session mainly to determine whether Company made wage offer of 4½%.

Sept. 8, 1964 Strike (*Date as of which Trial Examiner found Company had refused to bargain.*)

As the discussion of the law demonstrates, *infra,* Section 10(b) has been held by the United States Supreme Court to be a statute of limitation and not an evidentiary rule. As such, it was not waived by the Company which continually raised the objection that its rights under Section 10(b) were being violated by the Trial Examiner's allowing the wholesale introduction of evidence antedating the six-month limitation period [Tr. 35, 48, 51-52]. The Trial Examiner expended at least fifty percent of his Report discussing events occurring prior to May 10, 1964 and attempts to sustain his determination that the Company had violated its bargaining duty prior to September 8, 1964 by the bald assertion that the role of events antedating the limitation period was merely to shed light on events occurring within the period. However, as the above discussion reveals, *there was absolutely no evidence of any happenings during the limitation period of such a character that the evidence of events prior to May 10, 1964, could legitimately be utilized by the Trial Examiner.* As an examination of the Board decisions themselves reveal, *there must be substantial evidence of events occurring within the statutory period sufficient to sustain a finding of bad faith bargaining* without the merit of the allegations in the Complaint being shown solely by reliance upon earlier events.

Was the Trial Examiner's determination based upon a finding that the Company did not demonstrate due diligence in attending negotiating sessions? In his opinion he consistently refers to the evidence antedating the six-month limitation period as demonstrating the "foot dragging" tendencies of Company. However, as the parties had agreed on May 7, 1964 not to meet until a certain time, and when that time was reached the parties did in fact meet, there is absolutely not a scintilla of evidence within the relevant period upon which to conclude that Company was engaging in "foot dragging" or dilatory maneuvers. Similarly, inasmuch as the Company did in fact meet, did present a proposal with increased economic benefits, and demonstrated a desire to reach an agreement, there is no evidence within that period that it refused to bargain in good faith. The only conclusion which may be reached from the events occurring during the limitation period is that *neither* party had retreated from its position taken three years prior.

In the leading case of *Local No. 1424, International Machinists v. N.L.R.B. (Bryan Mfg. Co.)* (1960), 362 U.S. 411, the Supreme Court sought to define the scope and application of Section 10(b). The Court held, in that particular case that Section 10(b) is a statute of limitations, not a rule of evidence, and, as such prohibits the Board from sustaining the findings of any unfair labor practice upon acts which occurred before the six months period.

> ". . . we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events 'after records have been destroyed,

witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' HR Rep No. 245, 80th Cong. 1st Sess, p. 40, and of course to stabilize existing bargaining relationships.

* * * *

"As expositor of the national interest, Congress, in the judgment that a six-month limitations period did 'not seem unreasonble,' HR Rep No. 245, 80th Cong, 1st Sess, p. 40 barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights. 'It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy. . . .' Colgate-Palmolive-Peet Co. v. NLRB, supra (338 US at 363)." [P. 839, 845]

Local No. 1424, International Machinists v. N.L.R.B., 362 U.S. 411, 419, 429.

The Petitioner's attempt throughout its brief to establish an illegal motivation on the part of the Company because of various minor inconsistencies in the testimony of the Company's negotiator, Mr. Becker, glaringly illuminates the policy considerations leading to the passage of 10(b), as noted by the Court above. Mr. Becker was called upon to testify concerning minute details of negotiations spanning a four year period, an impossible task for anyone. Is there any doubt that recollections had become "dim and confused"? Will this Court sanction a remedial order of the Board based solely on events of ancient history?

The Court in *Bryan Manufacturing Co.* also noted, with apparent approval, the Board's refusal to permit reliance upon evidence relating to acts occurring prior to

the six-month period for the purpose of illuminating conduct within the six-month period where the evidence within the statutory period was too sketchy to warrant a finding of unlawful conduct.

> "Indeed, some Board cases have gone even further and held §10(b) a bar in circumstances when, although none of the material elements of the charge in a timely complaint need necessarily be proved through reference to the barred period—so that utilization of evidence from that period is ostensibly only for the purpose of giving color to what is involved in the complaint—yet the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the complaint is shown largely by reliance on the earlier events. See, e.g., News Printing Co., 116 NLRB 210, 212; Universal Oil Products Co. 108 NLRB 68; Tennessee Knitting Mills, Inc. 88 NLRB 1103."
>
> *Local No. 1424, International Machinists v. N.L.R.B.,* 362 U.S. 411, 421.

The Company contends that just such a case exists in the instant situation. There was no evidence of conduct within the statutory period sufficient to justify the wholesale introduction of evidence preceding the filing of the charge by over three years.

The decision of this Court in *N.L.R.B. v. Strong* (9th Cir. July 14, 1967), ... F. 2d ....., 65 L.R.R.M. 3012, further supports the position of the Company. In that case this Court recognized the effect of Section 10(b) of the Act and stated that if "nothing further" occurred during the 10(b) period, the finding of a violation of 8(a)(5) would have been barred. In that case, however, during the 10(b) period the Employer *refused several times to sign a contract which had been*

agreed upon. These refusals, in and of themselves, were a clear violation of the Act. Compare that to the present case where *nothing* did happen during the relevant period which would warrant a finding of bad faith because the absence of meetings was by *mutual consent,* the Company met with the Union *when requested,* and the Company offered a full contract proposal containing a *substantial wage* increase.

May the Trial Examiner's consideration of evidence subsequent to September 8, 1964, be utilized to sustain his and the Board's determination that the Company violated Section 8(a)(5) of the Act? The answer to that question is no. First, as has been demonstrated, the Trial Examiner and the Board concluded incorrectly and based solely upon events antedating the six-month limitation period of Section 10(b) that the Company had bargained in bad faith. Since that determination was incorrect and was clearly colored by and the result of events and acts antedating the limitation period, the Company would be prejudiced by an attempt to cure that erroneous determination by consideration at this time of events subsequent to September 3, 1964. Secondly, because he had determined that the Company had violated Section 8(a)(5) as of September 8, 1964, the Trial Examiner rejected the Company's defenses that the Union itself was refusing to bargain by its adamant position and the undisputed violence, mass picketing and vandalism which permeated and distorted the atmosphere of bargaining sessions subsequent to September 8, 1964 [R. 58-59].

Thirdly, the Trial Examiner prevented the Company from proving its allegation that Commissioner Haglund had been assisting the N.L.R.B., and failed to consider that Mr. Becker's good faith belief that because Commissioner Haglund was so acting, the negotiating sessions of December, 1964 and January, 1965 and thereafter were materially affected by the circumstances.

III.

Respondent's Constitutional Right to a Fair Hearing Was Denied When the Trial Examiner Refused to Compel Commissioners of the Federal Mediation and Conciliation Service to Appear, Testify and Disclose Information.

One of the most critical and contested procedural issues during the course of the hearing was whether or not the Company would be allowed to avail itself of the subpoena power of the N.L.R.B. in order to obtain evidence on its behalf [Tr. 636-675]. Although extended argument on the subject occurred during the hearing, points and authorities were filed on the point by Company, extended offers of proof were made by Company's counsel, the issue was raised in Company's Brief filed at the conclusion of the hearing before the Trial Examiner, and again before the Board, there is no reference in either the Intermediate Report of the Trial Examiner or the Decision of the Board as to the correctness of the ruling quashing the subpoenas which had been served upon Commissioners Grant Haglund and Jules Medoff of the Federal Mediation and Conciliation Service.

Commissioners Grant Haglund and Jules Medoff were served with subpoenas on November 1, 1965 requiring them to appear and produce their minutes in this matter on Wednesday, November 3, 1965 at 10:00 A.M. [R. Exh. 6(a) and (b)]. On November 4, 1965, Company telegraphed William E. Simkin, Director of the Federal Mediation and Conciliation Service, requesting permission for Commissioners Haglund and Medoff to appear, testify and disclose their minutes of the negotiations between MacMillan Ring-Free Oil Company and the Oil, Chemical & Atomic Workers of America, Local 1-128 which occurred at the offices of

the Federal Mediation and Conciliation Service during 1964 and 1965 [R. Exh. 6(f)].

On Friday, November 5, 1965 a telegram was received from the Federal Mediation and Conciliation Service denying Commissioners Haglund and Medoff permission to appear [R. Exh. 6(g)].

Neither of the Commissioners made an appearance at the hearings. The General Counsel for the Federal Mediation and Conciliation Service filed a Petition to Revoke Subpoenas, supported by points and authorities [R. Exh. 6(c) and (d)]. Points and authorities were also filed by Company in support of its position [R. Exh. 6(e)].

After an extended argument the Trial Examiner granted the Petition to Revoke Subpoenas [Tr. 669, 636-675]. At no juncture of the case, as revealed by the Petitioner's Brief, was there any issue that the Company had not complied with all procedural requirements to properly subpoena the mediators. The question was, and is, whether the Trial Examiner in quashing the subpoenas precluded the Company from having a fair hearing and the opportunity to properly defend itself against the allegations of the Complaint.

The two Commissioners of the Federal Mediation and Conciliation Service were subpoenaed by the Company for independent reasons. First, the Company subpoenaed Commissioner Jules Medoff to give testimony concerning statements of the parties which occurred during the meeting conducted under the auspices of the Federal Mediation and Conciliation Service on September 4, 1964. During the hearing extended testimony was elicited by all parties as to the conversations which occurred on September 4, 1965. The Company contended that Mr. Hunter of the Union had admitted before Commissioner Medoff that the Company had in fact on September 2, 1964 made an offer of a wage

increase of 4½% [R. 34]. The witnesses for the Union who testified at the hearing denied that Mr. Hunter had made such an admission [R. 34]. In his Intermediate Report, the Trial Examiner attempted to resolve the question presented by the conflicting testimony of the parties without having to find that either the witnesses for the Company or for the Charging Party had willfully misrepresented the conversation which occurred before Mr. Medoff [R. 34-36]. The issue of credibility is recognized by the Petitioner in its Brief (Pet. 41).

The Company contends however that because the Trial Examiner constructed his decision by making all of his findings dependent upon credibility of the respective witnesses, that the Company's constitutional right to a fair hearing were denied when it was unable to produce the one independent witness who could have testified whether Mr. Cody and Mr. Hunter were testifying truthfully during the hearing or whether they were in fact testifying untruthfully. If Mr. Medoff had been compelled to testify, and had testified as the Company contended he would, the Company would have been able to exonerate itself from accusations of the Government that it was not bargaining in a good faith manner and at the same time would have been able to cast serious doubt on the credibility of the Union negotiators' entire testimony as to all other points in dispute [Tr. 636-669]. In addition, as discussed *supra,* because the September 4 meeting was really the only event which occurred during the 10(b) period prior to September 8, 1964, the time as of which the Company was found to have refused to bargain; anything which occurred at that meeting would be important, particularly when described by a neutral party.

The Company subpoenaed Commissioner Haglund for two primary reasons. First, as the Company's

counsel stated to the Trial Examiner as an offer of proof, there was evidence that Mr. Haglund had cooperated with the National Labor Relations Board in its preparation of its case against the Company [Tr. 948-953]. The attorney for the Company stated in effect that if Mr. Becker were allowed to testify he would state he had been told by Commissioner Haglund that the latter had discussed the case with Miss Belle Karlinsky of the National Labor Relations Board and that upon a subsequent occasion Commissioner Haglund admitted that he had discussed the case both with Miss Karlinsky and the Regional Director of the National Labor Relations Board. If such was true, the Company had a right to review the records of the Federal Mediation and Conciliation Service to question Mr. Haglund concerning what information had been divulged to the National Labor Relations Board in order to determine whether or not the files contained evidence which would impeach or contradict evidence presented by the General Counsel.

Secondly, the testimony of Mr. Haglund was essential in order to explain the conduct of Mr. Becker during negotiating sessions conducted under the auspices of the Federal Mediation and Conciliation Service during the months of December, 1964, January, 1965, and thereafter. One of the extraneous factors which entered into the negotiations was Mr. Becker's determination that Mr. Haglund, by cooperating with the National Labor Relations Board and divulging information contained within his files, was no longer acting as a neutral conciliator but had removed himself from such a position and was now present at the negotiating sessions as an active proponent of the Union or the National Labor Relations Board [Tr. 194]. If the Company had been allowed to prove such during the hear-

ing, it could have explained in part why the negotiating sessions during the latter part of 1964 were not more fruitful.

In its argument to the Trial Examiner, the Federal Mediation and Conciliation Service relied upon Title 5, U.S.C. §22 as the primary statute upon which its claim of privilege rested [Tr. 641-646].

The Court specifically rejected a similar claim in *Harvey Aluminum (Incorporated) v. N.L.R.B.* (9th Cir. 1964), 335 F. 2d 749, 755:

> "The Board suggests that the 'housekeeping' regulations of the Departments of Justice and Labor afford no alternate ground for non-production. But such regulations are ordinarily construed as requiring only that the demand from production of agency documents be made upon the head of the agency rather than a subordinate employee, and the subpoenas which petitioners obtained were addressed to the Attorney General and the Secretary of Labor. Such regulations do not justify nondisclosure of their own force."
>
> *Harvey Aluminum (Incorporated) v. N.L.R.B.*, 335 F. 2d 749, 755.

See also:

United States ex rel. Touhy v. Ragen (1950), 340 U.S. 462 (especially Frankfurter J.'s concurring opinion at pp. 470-473), and

N.L.R.B. v. Capitol Fish Company (5th Cir. 1961), 294 F. 2d 868, 873, 875.

"5 U.S.C.A. § 22 cannot be construed to establish authority in the executive departments to determine whether certain papers and records are privileged. Its function is to furnish the departments with housekeeping authority. It cannot bar a ju-

dicial determination of the question of privilege or a demand for the production of evidence found not privileged. Had there been any doubt of this before, the doubt was removed by the amendment of 5 U.S.C.A. § 22 in 1958 making explicit the fact that the section does not itself create a privilege. This amendment added the sentence, 'This section does not authorize withholding information from the public or limiting the availability of records to the public.' 72 Stat. 547 (1958). As a matter of comity, courts frequently do not require disclosure of the evidence when the circumstances indicate that the records should be confidential; if the court wishes to scrutinize it to make sure, the evidence may be examined in camera. But the ultimate determination of the privilege remains with the courts."

N.L.R.B. v. Capitol Fish Company, 294 F. 2d 868, 875.

It is now clear that the determination of whether a document or testimony sought to be withheld by the Government under a claim of privilege is of such a nature that disclosure would be harmful to the public interest is a question for the courts and not for the executive branch of the Government.

"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officials."

United States v. Reynolds (1953), 345 U.S. 1, 9-10.

"Responsibility for deciding the question of privilege properly lies in an impartial independent judiciary—not in the party claiming the privilege and not in a party litigant."

N.L.R.B. v. Capital Fish Company, 294 F. 2d 868, 876.

See also:

8 Wigmore, *Evidence* (McNaughton Rev. 1961 pp. 809-810 and cases cited therein).

Recent cases have enunciated the principle that any right of the Government to withhold testimony or statements from a party must rest upon a recognized privilege. This Court so held in *General Engineering, Inc. v. N.L.R.B.* (9th Cir. 1965), 341 F. 2d 367:

> "It is true that a privilege purportedly created by Section 102.118 of the Board's rules and regulations, was claimed. The substance of this asserted privilege, as we have seen, is that all books and records of the Board, and all information which comes to a Board employee in the course of his official duties, is absolutely privileged unless the Board or general counsel consents to their production or release.
>
> "There are probably some court decisions which recognize a carte blanche 'privilege' of this kind. But, in view of section 10(b) of the Act, discussed above, and the last sentence of 5 U.S.C. § 22, discussed above, we believe that the claim must be particularized with reference to some generally recognized privilege accorded governmental agencies. Such, for example, are claims that the information sought would disclose confidential informants (Mitchell v. Bass, 8 Cir., 252 F.2d 513), state secrets (United States v. Reynolds, 345 U.S. 1, 7, 73 S.Ct. 528, 97 L.Ed 727), military secrets (United States v. Reynolds, supra), or mental processes of those engaged in investigative or decisional functions (United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429; Appeal of Securities & Exchange Commission, 6 Cir., 226 F.2d 501, 519). In the proceeding now be-

fore us no such privilege was either claimed or found to exist."

General Engineering, Inc. v. N.L.R.B., 341 F. 2d 367, 375.

Accord:

United States v. Reynolds (1953), 345 U.S. 1.

This is as it should be. Otherwise Federal executive officials will use "housekeeping" statutes as "a convenient blanket to hide anything Congress may have neglected or refused to include under specific laws." (*General Engineering, Inc. v. N.L.R.B.* (9th Cir. 1965), 341 F. 2d 367, 374.)

The broad privilege asserted here once again should be rejected by this Court.

A privilege may be created by the common law, by statute, or by regulation having the force of law in proper circumstances.

See:

8 Wigmore, *Evidence* (McNaughton Rev. 1961 pp. 798-804).

There is no common law privilege involved here. Neither has a privilege been created by legislation.[4]

Furthermore, even if a privilege exists, it would not be of the breadth asserted here. The statements in question were not confidential in nature, as they might be where one of the parties had explained the background of his position to a mediator. It does not add to the "trustworthiness" of the mediator for him to countenance either side's taking a false position, under oath, as to what actually occurred during a negotiating

[4]The regulation referred to in Petitioner's Brief is merely procedural, see above and *Rose v. Board of Trade of City of Chicago* (D.C.N.D. Ill., 1964) 35 F.R.D. 512, 515.

session. The mediator could not be accused of "taking sides" where he merely answers objective questions under subpoena as to matters of which he was witness. He cannot be accused of betraying the trust placed in him by the union if the statements to which he testifies were made, not to him in confidence, but openly to the Company.

Here the Charging Party and the Government introduced the conversations of all the parties before the mediators. Therefore, there was a complete willingness on their part to reveal all that occurred at those negotiations. Similarly, the only remaining party at those negotiations, the Company, wished to introduce additional testimony concerning those negotiations. This unique factual situation is quite distinct from the usual situation where the party initiating the action desires to introduce the testimony of a mediator over the opposition of the other party to the mediation sessions.

Petitioner, cites House Rept. 1497, 89th Cong., 2nd Sess. p. 10 as having some persuasive relevance to the issue presented in this case.

> "This exemption (of trade secrets and privileged or confidential commercial and financial information from the new 'public information' law) would assure the confidentiality of . . . disclosures made in procedures such as the mediation of labor-management controversies." (Pet. 39-40).

The quoted material focuses on *confidential disclosures of commercial and financial information.* The privilege claimed here is much broader. The statements here were not "disclosures" in the usual sense of the word. Nor were they "confidential." And they did not pertain to "commercial and financial information." The Company urges, moreover, that the passage of the new "public information" statute indicates a legislative in-

tent that the governmental agencies not be allowed to shield their files and witnesses from examination because of vague and artful claims of privilege.

In *Machin v. Zuckert* (D.C. Cir. 1963), 316 F. 2d 336, the U.S. Air Force asserted its military privilege as to an accident investigation report (see *United States v. Reynolds* (1953), 345 U.S. 1). The court correctly confined the assertion of privilege to information obtained through promises of confidentiality and required the Air Force to furnish independent "factual findings" and objective "conclusions."

It is elementary law that any privilege asserted by the Government must be strictly construed. Under Title 29, Chapter XII, Code of Federal Regulations, Part. 1401.5, regulating Federal mediators' compliance with subpoenas, a mediator is prevented from testifying with respect to matters coming to his knowledge in his official capacity. Under the facts of the instant case, Commissioner Haglund was acting outside the scope of his official capacity when he conferred with employees of the Board and actively cooperated with them in the preparation of the case against the Company.

Even if it is conceded, *arguendo,* that there exists a valid privilege, that privilege was clearly waived under the circumstances of the present case.

First, as to the testimony which might be obtained from Mr. Haglund, it was held in *Fireman's Fund Indem. Co. v. United States* (D.C. Fla. 1952), 103 F. Supp. 915, that the privilege is waived if a copy of a privileged document is placed in the hands of one of the parties. (See also *Federal Sav. & Loan Ins. Corp. v. First Nat'l Bank* (D.C. Mo. 1944), 3 F.R.D. 487.)

Here, where both the prosecutor and the witness are agencies of the same government and the witness has allegedly assisted the Government in preparing its case,

it would be grossly unfair to maintain that the privilege remain to shield the Government witness from impeachment.

Similarly, if Commissioner Medoff were an officer of the N.L.R.B., there would be no question but that the N.L.R.B. would have waived any privilege it might have with regard to his testimony.

> "Fundamental fairness requires that Capitol Fish be allowed to introduce testimony that may impeach the evidence offered against it. The NLRB cannot hide behind a self-erected wall evidence adverse to its interests as a litigant. 5 U.S.C.A. §22 does not call for a result so inimical to our traditions of a fair trial."
>
> *N.L.R.B. v. Capitol Fish Company,* 294 F. 2d 868, 875.

See also:

> *United States v. Beekman* (2d Cir. 1946), 155 F. 2d 580 (privilege waived where Government prosecutor in a criminal case possessed evidence bearing on the credibility of his witnesses).

The fact that the Commissioner is a member of a sister agency of the same Government has been held by this court not to affect the principle that, when the Government presents witnesses and relies upon their credibility, it must allow the opposing party access to potentially impeaching evidence which it may control. If it refuses to allow access to such evidence, it must lose the benefit of its witnesses. This is true even in noncriminal proceedings.

> *Harvey Aluminum (Incorporated) v. N.L.R.B.* (9th Cir. 1964), 335 F. 2d 749.
>
> "In a criminal prosecution the Department of Justice would scarcely be hard to say that it was

not required to produce statements otherwise within the rule simply because the documents rested in the hands of another federal agency and we perceive no valid distinction, for this purpose, between that case and this one. [B]ut the Departments of Justice and Labor are not sovereign, and though the Board may not be able to compel them to produce documents in their possession, the President or, if need be, the courts, may do so.

"The Board argues that the practical result of such a rule is that 'the Board must get the statements or lose the witnesses,' and this 'would leave the trial of Board cases at the mercy of the fortuitous coincidence of investigations conducted by this and other agencies—each concerned only with the administration of its laws.' This may well be true. An agency other than the Board, viewing the matter from its different vantage point, may conclude that the Board's interest in having the testimony of the witness is not as great as the agency's interest in maintaining the privacy of its files. If the view of the agency in possession of the witness' prior statement prevails, the Board's efforts to enforce its Act may be hampered. This would no doubt be unfortunate. But it would be less defensible still to resolve such agency disputes by permitting the Board to have the benefit of the testimony while denying the opposing party access to statements of the witness in possession of the government by which the testimony might be impeached."

Harvey Aluminum (Incorporated) v. N.L.R.B., 335 F. 2d 749, 754-755.

The Government, wearing one hat as a mediator, cannot be permitted to invoke a self-created and self-administered privilege and thereby sift the information

which it will release to the courts and thereby shield the Government, wearing another hat as prosecutor, from effective judicial control. This is particularly true where the alleged actions of Commissioner Haglund in revealing information to the N.L.R.B. removed the Federal Mediator and Conciliation Service from a "neutral" position to that of a prosecuting party.

IV.

The Company May Not Be Found to Have Violated Section 8(a)(5) as the Union Itself Was Bargaining in Bad Faith and/or Bargained in Such a Manner That Company's Good Faith May Not Be Measured.

The Board in other cases has recognized that one party's conduct in negotiations may not constitute a refusal to bargain if, in fact, the other party's conduct was not consistent with the obligation imposed equally upon it to bargain in good faith. If the conduct of the Union was such that it was not bargaining in good faith, no remedial order may issue against the Company even though there may be no formal charge pending against the Union at the time.

The rationale of such decisions is simple, clear and just: If the charging party was not engaging in bargaining so as to satisfy the dictates of the N.L.R.A. by itself bargaining in good faith, it is impossible for the Board to measure the conduct of the responding party. This rationale recognizes that the conduct of the responding party may only be determined to have been good or bad faith if all the surrounding circumstances are considered. One of the most important of these considerations is the conduct of the opposing party within the forum of negotiating sessions. Even before the National Labor Relations Act was amended in

1947 to make it an unfair labor practice for a union to refuse to bargain, the Board in *Times Publishing Company* (1947), 72 N.L.R.B. 676, stated that if the union itself is not bargaining in good faith a situation is presented whereby it is impossible to determine whether or not the employer has refused to bargain.

> "The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. *It follows that, although the Act imposes no affirmative duty to bargain upon labor organizations, a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.*" (Emphasis added) *Times Publishing Company*, 72 N.L.R.B. 676, 682-683.

See also:

Superior Engraving Co. v. *N.L.R.B.* (7th Cir. 1950), 183 F. 2d 783 (Employer may not be guilty of refusal to bargain if union itself not bargaining in good faith);

Servette, Inc. (1961), 133 N.L.R.B. 132 (The Board recognized that a refusal to bargain on behalf of the union or the union's assuming an adamant position would constitute a defense);

Imperial Machine Corp. (1958), 121 N.L.R.B. 621;

American Brake Shoe Co. (1956), 116 N.L.R.B. 820, rev'd on other grounds, 244 F. 2d 489 (7th Cir. 1957). (Union conduct incompatable

with the atmosphre of reasoned bargaining and mutual trust, even though not constituting a refusal to bargain, so contributed to the failure of the parties to reach an agreement that the employer may not be held to have violated Section 8(a)(5));

Shannon & Simpson Casket Company (1952), 99 N.L.R.B. 430;

Harcourt & Co. (1952), 98 N.L.R.B. 892.

In fact the Union's conduct in the instant case is very similar to that described by the Board in *Central Minerals Co.* (1944), 59 N.L.R.B. 757.

> *"However, we wish to point out, obiter, that absent the factors comprising the total situation as outlined above, we would not have found that the respondent's failure to make detailed and specific counterproposals in itself constituted bad faith negotiations, for the Union's ultimatum—'We have one contract' and 'you can take it or leave it'—would have relieved the respondent of that duty since the Union's position made it clear that specific counterproposals would be unavailing."* [Emphasis added] *Central Minerals Co.,* 59 N.L.R.B. 757, 758-759.

Throughout the hearing, the Company contended that the Union's position of adamant rigidity fully justified, and was the reason for, the Company's bargaining position. The Trial Examiner gave the Company's position slight consideration. The Trial Examiner delved deeply into reasons for the Company's position, speculating as to the mental processes of the Company's negotiators, but, as demonstrated by his Intermediate Report, felt it unnecessary to devote any consideration to the Union's bargaining attitudes and positions. The Trial

Examiner's treatment of the record indicates his view of collective bargaining as a one-way street. We submit that even on the basis of the Trial Examiner's findings, and the Board's subsequent adoption thereof, there was sufficient evidence of the Union's refusal to bargain so as to explain why no agreement was reached by the parties.

First, it must be recognized that collective bargaining does not take place inside of a vacuum capsule insulated from the influences of the past and the day-to-day conduct of the parties and the realities of the industrial complex. Throughout the entire course of the negotiations from June 13, 1961, until the end of March, 1965, the presence of the 1960 collective agreement was a spectre which continued to haunt both of the parties and exerted a considerable influence on their bargaining positions. Without exaggeration it may be said the Union maintained a position that it would settle for no less than its provisions [R. 24-25, 27, see *infra.*]. On the other hand, the Employer maintained that there would have to be various modifications and changes in some of the provisions of the 1960 agreement [R. 25-26, 45, 49, See *infra.*].

Alomst without exception, at the negotiating meetings spanning a four-year period, the Union negotiators adamantly insisted on reinstatement of the 1960 agreement with agreed economic improvements. Specific demands for a return to the old provisions were made repeatedly, including in negotiations at the following bargaining sessions: June 22, 1961; January 2, 1963; November 12, 1963; September 2, 1964; September 4, 1964; November 6, 1964; January 12, 1965; January 21, 1965; and January 28, 1965 [Tr. 812-814]. Each time the Company made a new proposal or modification, the Union refused to make any concessions or counter-

offers, demanding adherence to the language of the 1960 agreement.

The following excerpts from Mr. Cody's own testimony illustrate the adamant, "take it or leave it," attitude of the Union.

"Q. During the course of negotiations in meeting after meeting, you did demand or you requested that the Company return to the old contract, the 1960 contract, is that right?

A. In the early part of the negotiations.

Q. Up until what stage, then, did you demand?

A. Until we made our counter-proposal to the Company on October 18, 1962 [Tr. 261, lines 13-21].

. . .

Q. What about November 1, 1963; did you demand a return to the old contract in that meeting?

A. 1963?

Q. Yes.

A. I think what I said was this: That we would return to the old contract; as amended because it had been amended then on wages, and this was my recollection of what I said about returning to the old contract.

Q. This is the only particular in which the old contract, in your opinion, had been amended, was on wages, is that right?

A. Up until 1963, up to November of 1963, yes.

Q. Did you also make the statement that you wanted to return to the old contract on September 2nd, 1964, at the meeting on that date?

A. The old contract, I said that I would like to return to the old contract as amended then by vacations and wages [Tr. 262, line 12, to 263, line 3].

. . .

Q. What about November 6, 1964; did you make the statement in negotiations?

A. In this way: That we would take the old contract, as amended by the vacation clause and the vacation agreement and the wages [Tr. 263, lines 16-21].

. . .

Q. Did you make the same statement in the meeting on January 28, 1965?

A. Yes. I asked that they put our last proposal into effect, which included those letter agreements, or put the old contract into effect as amended." [Tr. 264, lines 3-9].

. . .

Of course, a major demand of the Union was the union security clause. The following occurred during the testimony of Mr. Cody:

"Q. Did you ever say that a Union shop agreement was an essential part of any contract that you entered into?

A. Yes. [Tr. 271, lines 12-16].

. . .

Q. At no time throughout the negotiations have you at any time modified your position on the Union security clause as contained in your original agreement, is that right?

A. That is right." [Tr. 271, line 25, to 272, line 5].

This is supported by Mr. Becker who said:

"To the best of my recollection we discussed several articles and always the Union shop issue was present and the check-off was present, and these were discussed in light with the past discussions, the Union saying that they would have to

have this, they would not sign a contract without the Union shop or check-off.

And I asked them why they had to have it.

And they said they had to give the employees security.

And I said, 'What other reason?'

And they advanced none, other than they had it in the old contract and they were not going to negotiate back and they would not sign the labor agreement without the Union shop and the check-off in it." [Tr. 973, lines 2-16].

In fact, at the February 26, 1964 meeting, Mr. Becker recalled Mr. Cody threatened that the Union would strike unless the Respondent granted the Union shop and check-off.

"And if I remember right, he told me they had strike authorization and they were going to strike us.

"And I told him I regretted this, they shouldn't strike, we should continue to negotiate and continue to resolve our problems; we should continue to negotiat*ions*.[Sic]

"And he said the Company wasn't giving what they wanted and they were not getting any place and they wouldn't sign a contract unless it had Union shop and check-off in it and if he couldn't get these things and have an amendment of the wage proposal that we had agreed to put in effect in the amendment of the old contract, he was going to take strike action against us." [Tr. 899, lines 13-24].

The extreme adamancy of the Union, an attitude that it would give no quarter and conveying the idea that the Union position was "all or nothing" is further confirmed by the terms of its last written contract proposal

of March 1, 1965. Of the 45 provisions of the 1960 agreement, 37 were incorporated verbatim into the last proposal of the Union [R. 25; G.C. Exh. 3(f); Tr. 63; R. 27; G.C. Exh. 3(h); Tr. 111]. Of the six remaining provisions, the Union added a new clause which would have obligated the Company to pay severance pay, added a new vacation provision providing increased benefits, modified the grievance procedure from a 4 step to a 2 step, and increased the term of the agreement from one to three years. Thus, in the face of the Company's argument that the old agreement had not worked efficiently and satisfactorily, the Union demanded the old agreement in a form modified only to provide greater economic benefits to the employees. As summarized by Mr. Becker at the Hearing:

> "I told Mr. Cody that we had reviewed his proposal and found it substantially the same, the identical proposal that he had made, that had been in the old contract and except a very few changes that we had previously agreed to in negotiations, it was the same contract that he had asked for and had been asking for since 1960, absent certain monetary changes.
>
> "I stated that 'You have increased the economic demands on this. You have increased the wage rates. You have increased—not only do you want a pension plan, you want two, one called a pension plan, another called a future pension plan. Also our economic demands by asking for a severance pay provision, vacations, you have increased our costs in vacation,' and I went down each of these items and told Cody wherein he had submitted to us practically the same, identical old contract, with the exception that he had increased the cost, the economic cost." [Tr. 994, lines 2-18].

Thus, the evidence is without contradiction that the Union assumed a position on what would be an acceptable contract on June 22, 1961 and steadfastly refused to modify or change that position in one significant iota up to and including the last negotiating session which occurred on April 2, 1965. Such conduct itself makes the whole concept of collective bargaining a sham. *It is without argument that the Union desired the execution of an agreement, but similarly, it is without argument that the Union would only accept an argument on terms which it dictated.* The Trial Examiner [R. 57-58] and the Petitioner in its brief (Pet. 34 fn. 21) contend that although the Union wanted a contract (*its* proposal) the Company's aim was to frustrate the bargaining process. There is no evidence that the Company was less anxious to reach an agreement (albeit its proposal) than the Union and for this desire it cannot be faulted. In the face of the Union's obstinancy, to hold that the Employer failed to bargain is to hold that it was in bad faith because it did not capitulate to each and every of the Union's demands. Or, if not each and every demand, what demand would the Board contend it should have agreed to satisfy its duty? On the other hand, who can say what the result would have been if the Union had demonstrated a willingness to compromise?

In the situation presented by the instant case, where both parties put forward proposals which they rigidly adhered to, the evidence cannot sustain the finding that the Company failed to bargain.

V.

The Violence, Threats and Intimidation of the Pickets, Directed Toward the Company and Its Employees Suspended the Employer's Duty to Bargain From September 8, 1964 Until the Date of the Hearing.

The Trial Examiner found it convenient to completely disregard the Company's defenses that the violence and vandalism of the Union and employees suspended its duty to bargain and explained the positions which it took during the negotiating sessions after September 8, 1964. First, the Trial Examiner found that because the strike of September 8, 1964 was caused by the Company's refusal to bargain, the subsequent violence would not have suspended the Company's duty to bargain [R. 59]. Secondly, because its negotiating attitude was not significantly different after September 8, 1964, its negotiating positions were not "shaped" by any of the reports of misconduct it received during the strike [R. 58-59].

We submit that inasmuch as, as discussed, the Trial Examiner had no basis for determining that the Company had refused to bargain prior to September 8, 1964, his reasoning that the Company's duty to bargain was not thereafter suspended is erroneous. Additionally, the Trial Examiner's conclusion that he need not consider whether the Company's bargaining positions were affected by the violence because its proposals were not materially different after 1964 in effect imposes the burden of proof of its good faith upon the Company. *If the Company could not be held to have bargained in bad faith as of September 8, 1964 the mere fact that its proposals were not materially different after that time could certainly be explained by the misconduct of the Union and the employees, or the Company attributing such to the Union.*

As noted in the Statement, during the course of the Hearing, the Company placed into evidence, both by way of exhibits and direct testimony, numerous examples of the acts of intimidation, coercion, arson, recrimination and mass picketing, which the Company and its employees experienced from the inception of the strike through and including the Hearing in this matter. The Company was engulfed in an atmosphere of violence which permeated and discolored the atmosphere of all the bargaining sessions which occurred after October 1, 1964, at least through April 1, 1965.

On October 26, 1964, the Company deemed it necessary to file a Complaint for Injunction and Damages against the OCAW and the striking employees [R. Exh. 4]. On October 26, 1964, the Superior Court for the County of Los Angeles issued an Order to Show Cause and Temporary Restraining Order. On December 1, 1964, the Company and the Charging Party entered into a stipulation whereby the Charging Party agreed that its employees, representatives, officers, organizers and members would be enjoined and restrained from mass picketing, rock-throwing, shoving and kicking at or near the Company's plant [R. 41]. On December 1, 1964, the Superior Court isued the preliminary injunction [R. 41]. On March 9, 1965, after a trial the Court found that four of the Union pickets had willfully failed to comply with the preliminary injunction in that they had used violent, threatening and abusive language, shoved, kicked, tripped and came into contact with the Company's employees not on strike, and tempered with or touched or came into contact with the Company's pipeline valves or other equipment, and, therefore, they were adjudged to be in contempt of court [R. Exh. 4].

The Complaint for Injunction and Damages, as originally filed, contained the declarations of eleven em-

ployees of the Company. It is not necessary to reiterate the contents in this Brief of those declarations and it suffices to state that they were filled with alleged acts of vandalism, kicking of employees, following of employees at night from work, rock-throwing, and mass picketing. The Supplemental Declarations which were filed in February of 1965 similarly contained allegations of unlawful acts of the pickets which continued through the months of November and December of 1964 and January of 1965 [R. Exh. 4].

The continuing occurrences of bodily injury, intimidation, and threats to the employees were called to the attention of the Company's officials on a regular basis. The employees were instructed during the course of the strike to record all such acts upon a yellow legal pad which was hung in the still shack for that purpose [Tr. 681].

Mr. Cliff Cailland or Mr. Bruce May collected these daily reports and forwarded them to the Company's negotiators, Mr. Henry Becker and Mr. Earl Willoughby [Tr. 623].

In order to illustrate for the Trial Examiner and the Board the types of incidents which occurred to the working employees and their wives during the duration of the strike, the Company introduced into evidence the testimony of various employees. It is important to note that the testimony of these employees was illustrative only and did not purport to definitely cover the entire spectrum of types and numbers of incidents which were reported to the Employer.

Mr. and Mrs. Walter Warner testified to having received threatening and obscene phone calls late at night continuously after Mr. Warner's return to work at the Company's refinery up until just prior to the Hearing [Tr. 700]. In addition, Mr. and Mrs. Warner testified

that on November 16, a molotov cocktail bomb was thrown through their bedroom window narrowly missing killing two their children [Tr. 700, 713-714].

Mr. William Lehman testified that he had watched mass picketing at the plant during the month of October, that he had discovered four acts of vandalism directed toward the locks on the Company's gates, and that he had been threatened by the pickets on one occasion [Tr. 717, 721, 719]. Joe Hill testified that after he returned to work even as late as the middle of June, 1965 (four months after the comtempt convictions and only shortly before the complaint issued) someone fired a pistol at his automobile which shattered the glass by his head [Tr. 742]. On another occasion in July or August of 1965, Mr. Hill's tires were slashed, his air-conditioning hose was cut, the power brake line was cut and the fan belt ripped off his car [Tr. 743]. Mr. Alfred Bernard testified that he began employment with the Company on October 30, 1964 and that he experienced considerable difficulty crossing through the pickets to get to work between October 30 and December 25 of 1964 [Tr. 759]. On one occasion, Mr. Mixon, a picket, stamped on one of his feet and swore at him [Tr. 760]. On another occasion, Mr. Garrett, another picket, pushed him off the sidewalk and told him that his time was running out [Tr. 760-761]. On yet another occasion as he was riding his motor scooter home from work, Mr. Malloy, another of the pickets, drove approximately six inches behind him at thirty miles an hour [Tr. 762-763].

All of the employees above described the types of mass picketing which the Union engaged in at the premises of the Company. It is important to note that the activities which were reported to the Company, as having been authorized by or engaged in by the Charging

Party, did not cease with the issuance of the Temporary Restraining Order, nor with the issuance of the injunction, nor after the Contempt Hearing, but continued up to the date of the Hearing. Further confirmation of either the Union's active sponsorship of the activities or condonation of them is gleaned from Mr. Hunter's, one of the Union negotiators, admission that the Union failed to take any action against the employees who were found to be in contempt of court, allowing them to continue walking picket, *and the convicted employees' admissions that the Union paid their fines* [Tr. 1166, 1183, 1190].

It is the position of the Company that the conduct of the pickets and striking employees suspended its duty to bargain with the OCAW during the duration of the mass picketing and violence even though the Company in a continuing attempt to reach an agreement continued to negotiate during this period. As discussed *supra,* the Employer's negotiators were made aware of the continuing activities of the Union, its agents and the striking employees by the daily reports of the working employees [Tr. 820, 860, 1025-1029]. In such a situation as is present in the instant case, the Board has recognized that it is impossible to ascertain whether an employer is bargaining in good faith and, therefore, the employer's obligations to the union are held in abeyance until such activities cease. The duty to recognize and bargain with a union is suspended during such time as the union is engaged in conduct incompatible with fair dealing.

In *Kohler Co. and Local 833* (1960), 128 N.L.R.B. 1062, *rev'd on other grounds,* 300 F. 2d 699, *remanded* 148 N.L.R.B. 147 (1964), the Board held that the employer was justified in breaking off negotiations on June 29 to August 5 and between August 16 and

September 5 and was not guilty of a refusal to bargain as the union had encouraged the coercion and intimidation of the non-striking employees.

> "The Board also finds, for reasons expressed by the Trial Examiner, that the Respondent was further justified in breaking off collective bargaining negotiations on August 18. We agree that the evidence shows the Union encouraged the continuation, spread, and enlargement of the home demonstrations by its publicity campaign, and that the home demonstrations constituted coercion and intimidation of the non-striking employees.
>
> "Accordingly, in view of the foregoing, and on the basis of the entire record, we find that the Respondent was not guilty of a refusal to bargain in good faith at any time between June 29 and August 5, or between August 18 and September 1."
>
> *Kohler Co. and Local 833,* 128 N.L.R.B. 1062, 1087-1088.

As articulated by the Board in the *Kohler* decision, no refusal to bargain charge may be based upon the employer's attitude at the bargaining table when the union abdicates its legitimate role as bargaining representative for the employees by espousing or sanctioning mass picketing, violence and other illegal activities.

Whether or not there was sufficient evidence introduced during the Hearing to establish that the Union officials were directly responsible for the violence, it suffices that the Company received information which led it in good faith to believe that the incidents were attributable to the Union, its agents, and the striking employees [Tr. 848, 852-853, 873, 876, 881, 883]. We do, of course, submit that the extent, nature, and continuation of the activities gives rise to more than a

reasonable inference that the Union did not seek to prevent the acts or was merely passive. This is confirmed by the fact that the contempt fines were paid by the Union.

It is difficult to conceive how an argument could be made with any validity that the public policy expressed by the National Labor Relations Act could be furthered by the Board's ordering an employer to bargain with a union and its members which were engaged in acts of the manner and kind present in the instant case. Any such holding would mean that, in addition to the legitimate economic weapons available to the union within the context of collective bargaining, the stamp of approval of a governmental agency would be given to a union's unlawful activities engaged in to obtain concessions from an employer.

> "In view of the well-settled rule that an employer's duty to bargain is suspended while a union is engaged in unprotected activity, we are constrained to find that Lantinga was under no obligation to speak with the Union while it was engaging in such threats. *Were we to hold otherwise, we would be encouraging the use by unions of threats of unlawful and unprotected action to force concessions from an employer.* Such a result would be contrary to the policy objectives of the Act. Accordingly, we find that under the above circumstances Lantinga's refusal was privileged and in no way violated the Act." (Emphasis added).
>
> *Valley City Furniture* (1954), 110 N.L.R.B. 1589, 1592, enf'd 230 F. 2d 947 (6th Cir. 1956).

As succinctly stated by Justice Frankfurter in *N.L.R.B. v. Insurance Agents' International* (concurring opinion) (1960), 361 U.S. 477, 506:

> "Unlawful violence, whether to person or livelihood, to secure acceptance of an offer, is as much a withdrawal of included statutory subjects from bargaining as the 'take it or leave it' attitude which the statute clearly condemns. One need not romanticize the community of interest between employers and employees, or be unmindful of the conflict between them, to recognize the utilization of what in one set of circumstances may only signify resort to the traditional weapons of labor in another and relevant context offend the attitude toward bargaining commanded by the statute." (*N.L.R.B. v. Insurance Agents' International,* 361 U.S. 477, 506).

The testimony introduced at the Hearing was without contradiction to the effect that the Company was continually influenced by the Union's history of "quickie strikes", vandalism and violence. Both negotiators of the Company were entirely familiar with the three strikes called by the local Union in 1960 and 1961 and the resultant damage and vandalism which accompanied them [Tr. 848, 852-853, 873, 876, 881, 883]. The Trial Examiner, found that the International Union was the representative of the employees rather than the local Union as alleged in the Complaint and referred to by the parties. Nevertheless, because the Company's state of mind is all determinative, it suffices that the Company's negotiators thought they were dealing with the local Union and realized they would be dealing with the local Union on a day to day basis.

> "I explained also we felt the International Union was a good Union, but the Local Union was ir-

> responsible and the conduct of the persons belonging to the Local Union caused us not to want to enter into a Union shop agreement with the Union." [Tr. 891, lines 6-10].

Similarly, it is without dispute that both Mr. Willoughby and Mr. Becker were constantly aware of the incidents of arson, following of employees, mass picketing, assault, and vandalism which occurred on a regular basis from the inception of the September 8, 1964 strike until the date of the Hearing, almost one year later.

Mr. Willoughby testified that he received and read regular reports of the employees and supervisors from the refinery as to these incidents [Tr. 820, 860]. These reports were also sent to Mr. Becker [Tr. 1025-1029]. Both Mr. Willoughby and Mr. Becker testified that the incidents were always a factor, and on some particular provisions of proposals a major factor, which persuaded the Company to ask the Union for modifications from the 1960 agreement [Tr. 817, 820, 825, 829, 848-854, 860, 875-876, 883, 890, 893, 934, 938, 982, 1028, 1031, 1032, 1046, 1049, 1054, 1062-65, 1067, 1086].

The Union's predisposition to strike and the related activities were always considered by the negotiators for the Company, and they were the major backdrop in front of which the negotiations took place. As melodramatic as it may sound, the incidents of the past strikes and the present strike was the setting for the negotiations, a setting which was of such a nature that the *dramatis personae* could not separate themselves from it.

> "Well, the Union's conduct on the picket line, the violence was engaged in, the necessity for obtaining a court injunction, the contempt of that court injunction, this all figured into this back-

ground, this history. This all is part of the negotiations. It is difficult to isolate out any particular thing and say, 'Is this affected in this way, this conduct?' It happens it is there. It cannot be forgotten, and it is always present, so regardless of the situation—" [Tr. 1086, lines 18-25].

Further supporting the bona fides of the Company is the fact that the relations with another union were amicable and the collective bargaining agreement contained provisions such as a union shop which the Company did not agree to in the negotiations with the Charging Party [G..C Exh. 3(bb)]. The difference in relations was the responsibility of the Oil Workers, or rather the difference existed because of their lack of responsibility. The record shows instead of union discrimination a recognition and appreciation by the Company of the character of the Union and the need, borne out by the event, to bargain accordingly. It was not a refusal to bargain attitude which prompted and guided the Company but a prudent and careful approach fully justified by prior and current actions of the Union.

Conclusion.

A fair reading of the credible and relevant evidence reveals that at worst the instant case involved nothing more than good, hard bargaining by the Company with the added fillips that the Company was faced for four years with rigid demands by the Union and inundated for a one-year period by violence, vandalism, mass picketing and employee intimidation.

Furthermore, the Board's Decision and Order relating 8(a)(5) violation is not supported by any evidence, let alone substantial evidence. Nothing occurred during the 10(b) period prior to September 8, 1964 to sup-

port a finding that the Company was not bargaining in good faith. To enforce such an order would allow the Board to literally read Section 10(b) out of the Act.

Furthermore, the Company was denied a fair hearing because it was not permitted to call and question the two federal mediators. To permit the government to prosecute the Company without allowing it access to witnesses and information which might exculpate it is contrary to all recent cases and must not be permitted.

For the reasons stated, it is respectfully submitted that with regard to the 8(a)(5) aspect of the Board's Order, the Petition for Enforcement must be denied.

Dated: November 9, 1967.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLARD Z. CARR, JR.